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*Sent via email to Camilla.Faulk@courts.wa.gov*

Washington State Supreme Court  
P.O. Box 40929  
Olympia, WA 98504-0929

RE: Proposed CrR 4.6

Dear Justices of the Washington State Supreme Court:

The Washington Association of Criminal Defense Lawyers (WACDL) strongly urges the Court to publish proposed CrR 4.6.

Amended CrR 4.6 will allow the trial court to take into consideration whether a witness who refuses to consent to having an interview recorded for accuracy should be ordered to appear for a deposition.

This rule will help to ensure an accurate, faster, and more reliable interview. There will be less stress and trauma on victims, and more ability to expose false allegations. Pretrial preparation will be less expensive, more efficient, and less cumbersome. Trials will be quicker, most efficient when cross-examinations are shorter, clearer and more easily understood by jurors. Juries will be less confused by cumbersome impeachment. The courts will more adeptly, efficiently and fairly fulfill their truth-finding function. The integrity of our judicial system will benefit by allowing more accurate fact-finding and thereby ensuring that the truth will be determined, as much as possible, while protecting victims from the misuse of a pretrial interview.

**I. The constitutional right to a pretrial interview and an opportunity for effective cross-examination.**

Article 1, section 22 of the Washington State Constitution provides an accused with the right to confrontation, the right to compel attendance of witnesses, to a speedy and public trial, as well as the other enumerated rights.

An accused has a right to a fair trial, to a pretrial interview of witnesses, to an opportunity for an effective cross-examination. *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976).

The opportunity for an effective cross examination requires that defense counsel have a verbatim transcript of the pretrial interview. Without a transcript, cross-examination breaks down to a series of denials. When confronted by an inconsistent statement, a dishonest witness may always reply that “[n]o, that is not what I said.” Or “you wrote what I said incorrectly.” That is not an opportunity for effective cross-examination.

The primary interest secured by the Confrontation Clause is the right of cross-examination, ‘the principal means by which the believability of a witness and the truth of his testimony are tested’ ...[C]ross-examination is the ‘greatest legal engine ever invented *for the discovery of truth*,’ *State v. Foster*, 135 Wash.2d 441, 456 (1998)(citations omitted, emphasis added).

To allow a witness to refuse to have a verbatim transcript taken of the interview is to allow a witness to manipulate the evidence that is produced at trial. Such allowance denigrates the idea that the trial is to determine the truth with competent evidence and degrades the truth-finding function of the judicial process. To have an accurate account of the interview protects an accused against false allegations and protects against convictions of the innocent, which helps protect the integrity of the judicial process.

## II. Depositions Help Protect Against False Allegations

False allegations should not be overlooked. While the precise *rate* of false accusation is still the subject of debate and study,<sup>1</sup> it undeniably occurs. Just this month the Thomas Kennedy, a Cowlitz County man, was released after serving nearly ten years in custody for sexual assaults that he did not commit.

Also undeniable is the unjust harm caused by false accusations. False allegations, especially of sexual abuse, are devastating. They harm not only to the accused, but the accused’s family. Loss of career and friends is common, not to mention the financial cost<sup>2</sup> and imprisonment. While Mr. Kennedy is finally free from custody, he will forever and unjustifiably suffer the physical, psychological, emotional and social costs of his wrongful conviction.

Revenge is one cause of false allegations.<sup>3</sup> Other evidence suggests that overzealous prosecution plays a role in this phenomenon.<sup>4</sup> Financial incentives have also been cited.<sup>5</sup> This Court need not unequivocally determine the rate of false accusation and wrongful imprisonment or its causes, in order to publish proposed rule CrR 4.6. The important thing is that it *does* occur and its rate can mitigated by publishing a rule designed to improve the truth seeking function of the courts.

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<sup>1</sup> In one study, Eugene Kanin found that in a nine-year period there were 45 false rape allegations, which constituted 41% of the total forcible rape cases reported during that period. False Rape Allegations, Eugene J. Kanin, Ph.D., Archives of Sexual Behavior, Vol. 23, No. 1, 1994.

In its opinion forum, Wendy McElroy addressed the subject of false allegations for Foxnews.com in an article titled “False Rape Charges Hurt Real Victims.” In her article she cites various statistics — ranging from 2% to 50% — related to false rape allegations.

Ms. McElroy also wrote an article for Foxnews.com titled “False Rape Allegations May be More Common Than Thought” in which she discusses statistics that suggest 1 in 4 accusations of rape are false.

The organization Respecting Accuracy in Domestic Abuse Reporting (RADAR) reports that about half of rape allegations are false. See Exhibit E. Justice:Denied magazine, Issue 24, page 3 recounts The Robert Hays Story, a man falsely accused of sexual abuse against his daughter..

<sup>2</sup> False allegations of domestic violence costs taxpayers approximately \$20 billion a year. 2008 RADAR report.

<sup>3</sup> The Cowlitz County case is but one example.

<sup>4</sup> In another opinion piece written by Ms. McElroy, she recounts an experience of a teenager charged by an overzealous prosecutor who campaigned on being tough on sex offenders and needed a high conviction rate. When asked why the prosecutor was being so zealous in his pursuit of that defendant, the prosecutor answered, “because we can.”

<sup>5</sup> There are potential financial incentives for false allegations. See *A Culture of False Allegations: How VAWA harms Families and Children*.

### III. The Concerns of Victim's Advocates

WACDL strongly agrees that victims of crimes should be afforded dignity and respect, but disagree with the Office of Crime Victims Advocacy, which has been opposed to allowing attorneys to record a pretrial interview. In her letter dated April 28, 2010 opposing proposed CrR 4.11, Bev Emery discounts the importance of accuracy by ascribing convenience as the motivating factor for the rule. She adds that there is a valid concern that the recording *will* be misused. It is presumed that defense attorneys, just like prosecuting attorneys, will comply with their ethical and legal obligations and will follow any protective orders issued by the court and with the restrictions contained in CrR 4.7.

Also opposed to permitting a pretrial interview to be recorded, Jenny Wieland writes on behalf of Families and Friends of Violent Crime Victims in her April 27, 2010 letter to WSBA. Ms. Wieland writes that it is irresponsible and potentially damaging to force victims to relieve traumatic crimes on audiotape. Ms. Wieland gives no explanation as to how this would be more traumatic than it would be to have the interview handwritten.


Taking handwriting notes of an interview takes longer and requires more repetition and has greater impacts on victims than does a deposition. Moreover, those opposed to permitting a deposition give no examples of a deposition actually being misused.

Having a verbatim transcript protects the victim. If the interviewer is abusive, insulting or otherwise inappropriate, the opposing party has an accurate account of the interview and can present it to the trial court, which can take appropriate actions.

The Washington Supreme Court should publish proposed rule CrR 4.6. The right to a fair trial requires it. Interviews will be less traumatic for victims. The verbatim transcript produced by a deposition reduces the length of trials because impeachment is cleaner, requires fewer witnesses and is not broken up in the course of the trial. Testimony is much clearer. Allowing the court to determine whether a deposition should be permitted enables the trial court to take into account a witness' refusal to be recorded when determining whether a deposition should be permitted. If the witness has a good faith basis for opposing the deposition, the trial court may take that into account and disallow a deposition. Depositions will reduce convictions based on false allegations. Depositions are more accurate than handwritten notes. That accuracy protects the integrity of the truth-finding function of the courts. WACDL strongly urges the Washington State Supreme Court to publish proposed CrR 4.6.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Kent Underwood, Co-Chair  
WACDL Court Rules Committee



Teresa Mathis  
WACDL Executive Director